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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0871**

State of Minnesota,
Respondent,

vs.

Noe Hugo Toscano,
Appellant.

**Filed February 20, 2018
Affirmed
Johnson, Judge**

Marshall County District Court
File No. 45-CR-16-355

Lori Swanson, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Donald J. Aandal, Marshall County Attorney, Warren, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Ross, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

A Marshall County jury found Noe Hugo Toscano guilty of driving while impaired. The jury's verdict is based on evidence that deputy sheriffs found Toscano standing next

to his broken-down pickup truck on a rural highway, that he told the deputies that he had driven the pickup truck to that location before it broke down, and that he was under the influence of controlled substances. On appeal, Toscano argues that the circumstantial evidence is insufficient to support the conviction because the state did not prove beyond a reasonable doubt that he was impaired by controlled substances while he drove the pickup. We affirm.

FACTS

On November 2, 2015, at approximately 8:00 a.m., two deputy sheriffs responded to a report that a vehicle was stalled near the intersection of U.S. highway 59 and county road 7 in Marshall County. When the deputies arrived, they saw a pickup truck parked on the side of the road with an open hood, open doors, and a “large puddle of gas” on the ground alongside it.

The deputies encountered only one person at the scene: Toscano. At trial, Deputy Cervantes testified that Toscano was “pacing around, . . . waving his hands in the air,” fidgeting, and struggling to keep his balance. Deputy Cervantes also testified that Toscano’s pupils were dilated and that he “had some foam buildup around the corners of his mouth.” The deputies suspected that Toscano was under the influence of a controlled substance.

Toscano initially told Deputy Cervantes that he had left a casino earlier that morning and was driving the pickup to work when it broke down. When asked how long he had been stranded, Toscano gave conflicting answers: “He said a half hour, an hour, and then I think as long as a couple hours He wasn’t quite sure.” Toscano denied owning the

pickup, but the deputies confirmed that it was registered to him. The deputies also learned that Toscano's driver's license was suspended.

The deputies arrested Toscano. In a pat-down search, Deputy Cervantes found the keys to the pickup in Toscano's back pocket. When Deputy Cervantes attempted to start the pickup, the engine "turned over just slightly" but did not start. The deputies did not find any drugs or drug paraphernalia on Toscano's person, in the pickup, or elsewhere at the scene of the break-down.

After transporting Toscano to the jail, Toscano changed his story by saying that he did *not* drive the pickup before it broke down. Deputy Cervantes obtained a warrant for a search of Toscano's blood. A blood sample was taken and tested. The test revealed that Toscano had 0.037 mg/L of amphetamine and 0.151 mg/L of methamphetamine in his blood.

The state charged Toscano with first-degree driving while impaired (DWI), in violation of Minn. Stat. § 169A.20, subd. 2 (2014). At trial, the state called four witnesses: the two deputies who interacted with Toscano at the scene of the break-down and arrested him; a medical laboratory technician, who took a blood sample from Toscano; and a forensic scientist with the bureau of criminal apprehension, who tested Toscano's blood sample. The defense did not present any evidence.

The district court instructed the jury that it should find Toscano guilty if he "drove, operated, or was in physical control of a motor vehicle" and if, "at the time the defendant was driving, operating, or in physical control of a motor vehicle, the defendant's body contained any amount of amphetamine or methamphetamine." In closing argument, the

prosecutor acknowledged that there was no direct evidence “of when or how Mr. Toscano ingested the methamphetamine” but asked the jury to infer “that he consumed it prior to operating the motor vehicle that day” and that “he had methamphetamine in his body when he was driving.” The prosecutor also argued in the alternative that the jury should find that Toscano was in physical control of the pickup after it broke down and that his body contained controlled substances at that time.

The jury found Toscano guilty. The district court imposed a sentence of 57 months of imprisonment. Toscano appeals.

DECISION

Toscano argues that the evidence is insufficient to support his conviction. To establish that Toscano is guilty of DWI, the state must prove beyond a reasonable doubt that he drove, operated, or was in physical control of a motor vehicle while he was “under the influence of a controlled substance.” *See* Minn. Stat. § 169A.20, subd. 1(2) (2014).

Toscano concedes that the evidence is sufficient to establish that he drove the pickup to the place where it broke down and that he had amphetamine and methamphetamine in his body when the deputies arrived at the scene of the breakdown. But Toscano contends that the evidence is insufficient to establish that he had amphetamine and methamphetamine in his body at the same time that he drove, operated, or was in physical control of the pickup. More specifically, Toscano contends that the state’s evidence does not establish beyond a reasonable doubt that he did not consume controlled substances after the pickup broke down, at which time he could not operate or be in physical control of the pickup because it was inoperable. In response, the state argues only that the circumstantial

evidence is sufficient to establish that Toscano was under the influence of a controlled substance while he was driving the pickup, before it broke down. The state does not argue in the alternative that the conviction should be affirmed on the ground that Toscano operated or was in physical control of the pickup after it broke down.

In reviewing whether there is sufficient evidence to support a conviction, this court ordinarily undertakes a “painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient” to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). “[W]e will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Ortega*, 813 N.W.2d at 100.

The parties agree that Toscano’s conviction rests on circumstantial evidence and that this court should apply the standard of review that is appropriate for circumstantial evidence. In reviewing a conviction based on circumstantial evidence, this court applies a two-step analysis. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we “identify the circumstances proved.” *Id.* (citing *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)). “In identifying the circumstances proved, we assume that the jury resolved any factual disputes in a manner that is consistent with the jury’s verdict.” *Id.* (citing *Andersen*, 784 N.W.2d at 329). Second, we “examine independently the reasonableness of the

inferences that might be drawn from the circumstances proved” and “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotations omitted). “To sustain a conviction based on circumstantial evidence, the reasonable inferences that can be drawn from the circumstances proved as a whole must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017) (internal quotation omitted).

At the first step of the circumstantial-evidence analysis, we must identify the circumstances proved that are relevant to the question whether Toscano was under the influence of a controlled substance while he was driving the pickup. *See Moore*, 846 N.W.2d at 88. The relevant circumstances proved are as follows: (1) Toscano was driving his own pickup from a casino to his workplace when it broke down, (2) Toscano was standing near the pickup when the deputies arrived, (3) the doors and hood of the pickup were open when the deputies arrived, (4) Toscano appeared to be working on the pickup, (5) Toscano had the keys to the pickup in his back pocket, (6) Toscano denied ownership of the pickup and denied that he drove it, (7) Toscano had amphetamine and methamphetamine in his body when the officers arrived at the scene of the breakdown, and (8) the deputies did not find any drugs or drug paraphernalia on Toscano’s person, in the pickup, or elsewhere at the scene of the break-down.

At the second step of the analysis, we must “examine independently the reasonableness of the inferences that might be drawn from the circumstances proved” and “determine whether the circumstances proved are consistent with guilt.” *Moore*, 846

N.W.2d at 88 (quotations omitted). The state's theory is that Toscano consumed controlled substances before he drove the pickup to the place where it broke down. We agree with the state that it is reasonable to infer from the circumstances proved that Toscano consumed controlled substances before driving the pickup to the place where it broke down and, thus, that he was under the influence of controlled substances at the time that he was driving the pickup.

At the second step of the analysis, we also must determine whether the circumstances proved are "inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted). Toscano contends that the circumstances proved are consistent with another hypothesis, that he consumed controlled substances after the pickup broke down. He asserts that the deputies did not perform an extensive search of the pickup or the surrounding area and, thus, that the circumstances do not preclude "the possibility that drugs and drug paraphernalia were in the truck," the possibility that he "discarded whatever drugs and drug paraphernalia he possessed into the ditch before the police arrived," or the possibility that he consumed drugs after the pickup broke down. Toscano also points out that the state did not introduce any evidence as to whether drug paraphernalia was necessary for him to consume drugs after the pickup broke down. The state responds by contending that Toscano's argument is based on speculation and that the absence of any drug paraphernalia at the scene of the breakdown makes it highly unlikely that Toscano consumed drugs there. The state also contends that Toscano's evasiveness and false statements to the deputies indicates a self-awareness of his guilt. *See Andersen*, 784 N.W.2d at 331-32.

In light of the circumstances proved, it is simply implausible that Toscano did not use drugs until after his pickup broke down. Given Toscano's interest in fixing the pickup so he could get to work, it is highly unlikely that he ingested drugs after the breakdown but before attempting to fix the pickup or while working on it. In addition, the absence of any drug paraphernalia makes it highly unlikely that Toscano used drugs after the breakdown, and that inference may be made based on common knowledge that a pipe or a needle and syringe are most often used to consume methamphetamine. Furthermore, Toscano's denial that he owned the pickup, which was shown to be false, and his denial that he drove the pickup to the scene of the breakdown, which contradicted his earlier admission that he did drive it, further diminish his theory of innocence. In light of all the circumstances, the inference that Toscano consumed drugs only after the pickup broke down is simply not a reasonable inference, which means that there are no rational hypotheses of innocence. *See Harris*, 895 N.W.2d at 598; *Moore*, 846 N.W.2d at 88.

Thus, the circumstantial evidence is sufficient to establish that Toscano is guilty of DWI.

Affirmed.